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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-first session, 17–21 November 2014

No. 44/2014 (Republic of the Congo)

Communication addressed to the Government on 28 July 2014

Concerning: Mbanza Judicaël, Kimangou Joseph, Miakamouna Nzingoula Sylvain, Bibila Gilbert, Mabiala Mpandzou Paul Marie, Tsiakaka Valentin, Baboyi Antoine, Silaho René, Matimouna Mouyecket Euloge, Kialounga Pierre Placide, Tandou Jean Claude Davy, Ngoma Sylvain Privat, Banangouna Dominique Mesmin, Londhet Moussa Landry[1]

The Government has not replied to the communication.

The State is a party to the International Covenant on Civil and Political Rights, to which it acceded on 5 October 1983.

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period by Council resolution 15/18 of 30 September 2010. The mandate was extended for a further three years by Council resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

[1] The Working Group has retained the names as spelled in the judgement issued on 31 March 2014 by the indictment chamber of Pointe-Noire court of appeal.

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The source relates that, on 21 August 2013, a working meeting of members of the Cercle des Démocrates et Républicains du Congo (Congolese Circle of Democrats and Republicans – CDRC) was taking place at the home of the party's vice-president, Miakamouna Nzingoula Sylvain, in the Mpaka "Belle Vie" district of Pointe-Noire. Officers of the Pointe-Noire police force and gendarmerie allegedly burst in at 8 a.m. and took away all those present. The other party members and supporters were arrested without a warrant by the officers that same day, either in the street or at their homes. All were detained in Pointe-Noire prison. The arrests were allegedly made in response to a protest march held earlier that day, during which the persons in question had waved placards reading "*Carton rouge = démission du gouvernement*" ("Red card = government resignation"), which, according to the source, had been interpreted by the Congolese State as an act of rebellion justifying their arrest. Nevertheless, officials had allegedly stated that the individuals would not be arrested, as they had neither committed an offence nor violated the laws of the Republic.

4. In the various case materials submitted to the Working Group, the parties to the complaint who are still in detention are identified as follows:

(a) Mbanza Judicaël is a Congolese national born on 23 August 1984[2] in Kinkala. He is unemployed, single and a father of seven. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Ngoyo district of Pointe-Noire;

(b) Kimangou Joseph is a Congolese national born on 6 October 1963 in Mindouli. He is a taxi driver, single and a father of six. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Ngoyo district of Pointe-Noire;

[2] The detainees' dates of birth are those contained in the judgement issued on 31 March 2014 by the indictment chamber of Pointe-Noire court of appeal.

(c) Miakamouna Nzingoula Sylvain is a Congolese national born around 1951 in Kigoma. He is an anaesthetist, married and a father of seven. He was not subject to military service and was reportedly given a 1-year suspended prison sentence in the past. He is vice-president of CDRC and lives in the Mpaka "Belle Vie" district of Pointe-Noire;

(d) Bibila Gilbert is a Congolese national born on 13 February 1958 in the village of Kivimba, in the district of Ngoma Tsé-Tsé. He is a secondary-school teacher, single and a father of three. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is the general secretary of CDRC and lives in the Ngoyo district of Pointe-Noire;

(e) Mabiala Mpandzou Paul Marie is a Congolese national born on 3 May 1972 in Massangi, in the department of Bouenza. He is a photographer, single and a father of four. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(f) Tsiakaka Valentin is a Congolese national born on 14 February 1968 in Vindza. He is a driver, single and a father of five. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(g) Baboyi Antoine is a Congolese national born on 7 September 1960 in Linzolo. He is a driver by occupation. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(h) Silaho René is a Congolese national born around 1951 in the village of Ngampoko. He is retired. He was not subject to military service and claims never to have been sentenced or prosecuted. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(i) Matimouna Mouyecket Euloge is a Congolese national born on 17 April 1984 in Baratier. He is a driver by occupation. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(j) Kialounga Pierre Placide is a Congolese national born on 22 November 1966 in Pointe-Noire. He is unemployed and was not subject to military service. He does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(k) Tandou Jean Claude Davy is a Congolese national born on 9 August 1974 in Hamon. He is unemployed and was not subject to military service. He does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(l) Ngoma Sylvain Privat is a Congolese national born on 3 September 1984 in Brazzaville. He is a driver by occupation. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(m) Banangouna Dominique Mesmin is a Congolese national born on 31 March 1976 in Moussana. He is a welder and painter. He was not subject to military service and does not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire;

(n) Londhet Moussa Landry is a Congolese national born on 8 June 1977 in Brazzaville. He is a construction electrician. He was not subject to military service and does

not appear to have been sentenced or prosecuted in the past. He is a member of CDRC and lives in the Mpaka district of Pointe-Noire.

5. The source reports that the president of CDRC, Modeste Boukadia, telephoned those responsible to find out the reason for the arrests. The officials seemed surprised by the call, suggesting that the real target of the arrests was Mr. Boukadia himself. According to the source, this was confirmed by the fact that a second squad was sent out to try and intercept him and Pointe-Noire was sealed off. Moreover, the source states that an arrest warrant for rebellion was issued against the CDRC president following the holding of rallies in Brazzaville on 11 May 2013 and Pointe-Noire on 29 June 2013, which the President of the Republic of the Congo had allegedly branded as a threat to State security, an insurrection and public incitement to revolt.

6. The source reports that the State prosecutor declared that there was no case against the individuals concerned and that only a political decision could authorize their release, as the justice system had no evidence to support bringing charges against them. Consequently, the CDRC president, Mr. Boukadia, allegedly wrote to the Minister of Justice of the Republic of the Congo on 13 September 2013 assuring him of his party's peaceful intentions and requesting the detainees' immediate release. According to the source, the letter received no response. The source adds that Mr. Boukadia sent the same request to the President of the Republic of the Congo in a letter dated 10 October 2013, which also remained unanswered. The source reports that the President did, however, make a promise through the Minister of Justice to release the individuals. Moreover, the source appears convinced that the President signed a release order.

7. The source reports that, despite this measure, the 14 party members and activists continued to be held in Pointe-Noire prison. The source adds that some of them were ill and did not receive the necessary treatment.

8. Among the documents submitted to the Working Group by the source is an order issued on 23 October 2013 by the Pointe-Noire *tribunal de grande instance* (court of major jurisdiction) charging 28 persons, including the 14 party members, with rebellion and referring the case file to the public prosecutor of Pointe-Noire court of appeal.

9. The source reports that, on 18 December 2013, after bringing the facts to the attention of France and the European Union, CDRC president Mr. Boukadia filed a case against the President, the Minister of Justice and the Congolese State with the International Criminal Court and complained to the Paris *tribunal de grande instance* and the State prosecutor in Paris.

10. According to the information received, on 31 March 2014, the indictment chamber of Pointe-Noire court of appeal issued a judgement against the persons named in the order of 23 October 2013. The judgement commits them to trial before Pointe-Noire criminal court for threatening the internal security of the State (an act covered by article 87 of the Criminal Code and articles 195 and 198 of the Code of Criminal Procedure) and orders their continued detention.

11. The indictment specifies that, after the rallies, CDRC decided to organize a march. Two preparatory meetings were reportedly held on 20 August 2013. The following day, the day of the march, the activists allegedly waved placards reading "*Gouvernement d'union nationale*" ("Government of national unity") and "*Carton rouge = démission du gouvernement*" ("Red card = government resignation"). Law enforcement officers then intervened to maintain public order after burning barricades were erected in the streets, arresting the activists and seizing materials from their homes. Among the confiscated items was a board displaying the party's ambitions, namely, a reference to the Constitution of a future State of South Congo. The activists allegedly admitted that the purpose of the march

was to put in place a government of national unity, which was why the indictment chamber had decided to charge them with threatening the internal security of the State.

12. According to the source, a trial took place before Pointe-Noire criminal court on 7 April 2014, in which the 14 individuals were assisted by lawyers and human rights bodies, but no first-instance judgement was ever issued. The source further reports that the prefect of Pointe-Noire, who had been summoned to provide evidence of the threat to State security, failed to appear.

13. According to the information received, a judgement was issued on 9 April 2014, but it has not been possible to obtain a copy. The judgement has not been published and, according to the source, newspapers are prohibited from disseminating it, although some media have managed to mention it. According to the information received, of the 28 persons indicted, 13 were released, 1 was sentenced in absentia to hard labour and the other 14, to whom this communication refers, received the following prison terms: 7 years for Miakamouna Nzingoula Sylvain, Mabiala Mpandzou Paul Marie and Tsiakaka Valentin; 5 years for Mbanza Judicaël, Kimangou Joseph, Bibila Gilbert, Baboyi Antoine, Silaho René, Matimouna Mouyecket Euloge, Kialounga Pierre Placide, Tandou Jean Claude Davy and Banangouna Dominique Mesmin; and 2 years for Londhet Moussa Landry and Ngoma Sylvain Privat.

14. According to the source, the 14 individuals were eventually transferred, on 18 July 2014, from Pointe-Noire prison to an unknown location in Brazzaville, with no indication of the reasons for the transfer. They have allegedly been held in an unknown location since that date.

15. The source claims that the detentions are arbitrary, in that they result from a violation of articles 9, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 19 and 21 of the International Covenant on Civil and Political Rights, on the freedoms of opinion, expression and assembly, and therefore come under category II of the criteria applicable to the consideration of cases submitted to the Working Group.

16. According to the source, the detentions are also arbitrary under category III of the criteria referred to by the Working Group, as guarantees of a fair trial were not respected. The lack of a warrant for their detention, the delays in bringing charges and issuing a judgement and the absence of a first-instance judgement are in direct violation of articles 10 of the Universal Declaration of Human Rights and 14 of the International Covenant on Civil and Political Rights.

Response from the Government

17. In a letter dated 28 July 2014, the Working Group transmitted the above allegations to the Government of the Republic of the Congo and requested detailed information on the current situation of the 14 individuals in question and clarification of the legal basis justifying their detention.

18. The Working Group regrets that, to date, the Government has neither replied to the allegations transmitted to it nor requested an extension of the time limit for doing so in accordance with paragraphs 15 and 16 of the Working Group's methods of work.

19. Despite the Government's failure to reply, the Working Group considers that it is in a position to render an Opinion on the detention of the 14 CDRC members, in conformity with paragraph 16 of its methods of work and on the sole basis of the information provided by the source.

Discussion

20. Firstly, the Working Group is of the view that grouping all the files concerning Mbanza Judicaël, Kimangou Joseph, Miakamouna Nzingoula Sylvain, Bibila Gilbert, Mabiala Mpandzou Paul Marie, Tsiakaka Valentin, Baboyi Antoine, Silaho René, Matimouna Mouyecket Euloge, Kialounga Pierre Placide, Tandou Jean Claude Davy, Ngoma Sylvain Privat, Banangouna Dominique Mesmin and Londhet Moussa Landry is justified because the same facts led to their detention and conviction, as reported by the source.

21. Article 9 of the Universal Declaration of Human Rights stipulates that "[n]o one shall be subjected to arbitrary arrest, detention or exile", and thus prohibits all arbitrary arrest or detention. This prohibition is a fundamental rule of customary international law and is recognized as a peremptory norm of general international law or *jus cogens*.[3] The norm is also enshrined in article 9 of the International Covenant on Civil and Political Rights, to which the Republic of the Congo is a party, and article 9 of the Constitution of the Republic of the Congo of 20 January 2002.[4]

22. Moreover, articles 19 and 20 of the Universal Declaration of Human Rights and 19 and 21 of the International Covenant on Civil and Political Rights guarantee the exercise of the rights to freedom of opinion, expression, peaceful assembly and association. The imparting of information and political opinions by members of a party is at the core of these rights, and restrictions can be imposed only on a basis of strict proportionality. Moreover, any restrictions must be provided for in law.

23. The Human Rights Committee, in paragraph 25 of its general comment No. 34 (2011) on freedoms of opinion and expression, sheds light on the application of the rule in article 19 of the Covenant, stating that: "a norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public." Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

24. In paragraph 34 of General Comment No. 34, the Committee also provides that "[r]estrictions must not be overbroad" and must conform to the principle of proportionality. In addition, according to the Human Rights Committee, a State must demonstrate "in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".[5]

25. The Working Group has already addressed the issue of overly broad definitions of criminal offences in its earlier jurisprudence.[6]

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[3] See the established practice of the United Nations as set out by the Human Rights Committee in its general comment No. 29 (2001) on states of emergency, para. 11, and in Deliberation No. 9 of the Working Group on Arbitrary Detention (A/HRC/22/44), para. 79.

[4] Extract from the Constitution of 20 January 2002: "The liberty of the human person shall be inviolable. No one may be accused, arrested or detained arbitrarily. All accused persons shall be presumed innocent until their guilt has been established through proceedings in which their rights as defendants are protected. All acts of torture and all forms of cruel, inhuman or degrading treatment shall be prohibited." The Constitution is available online on several government websites, including the website of the Presidency (www.presidence.cg/files/my_files/constit200102.pdf).

[5] General comment No. 34, paras. 34 and 35.

[6] See, inter alia, Opinions Nos. 28/2010 (Myanmar), para. 32; 18/2011 (Saudi Arabia), para. 20; and 25/2012 (Rwanda), paras. 55 and 59.

26. Moreover, the Working Group stated in its Deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet that a vague and general reference to the interests of national security or public order, without being properly explained and documented, is not enough to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty are necessary (E/CN.4/2006/7, para. 43).

27. According to the source, the order issued by the Pointe-Noire *tribunal de grande instance* charged the CDRC members with rebellion. Rebellion, however, is an act of violent opposition to a person vested with public authority acting in the lawful performance of his or her duties. In the present case, the fact that the CDRC members waved placards reading "*Gouvernement d'union nationale*" ("Government of national unity") or "*Carton rouge = démission du gouvernement*" ("Red card = government resignation") does not meet the definition of rebellion. The CDRC members were simply exercising their right to freedom of expression. The judgement issued by the indictment chamber of Pointe-Noire court of appeal on 31 March 2014 states that the CDRC members also incited and instigated residents of the Ngoyo and Mpaka districts to rebel against the authority of the head of State and implicitly espoused the ideal of dividing the Congo into North and South. The chamber adds in its judgement that certain CDRC activists and supporters constructed barricades from burning tyres and wrecked vehicles. The Working Group considers that these acts, if proven, do not reach the threshold of violence required for them to be viewed as acts of rebellion.

28. The Pointe-Noire court of appeal reportedly went further than the order by invoking a threat to the internal security of the State, in accordance with articles 87 of the Criminal Code and 195 and 198 of the Code of Criminal Procedure. The notion of "threat to the internal security of the State" is vague and imprecise. It does not make it possible to ascertain what conducts can properly be restricted. Moreover, despite the tensions that exist in the Congo, the Working Group considers that the facts are not enough to constitute, objectively, a "threat to the internal security of the State". Moreover, the necessity and proportionality of the detention have not been demonstrated by the Government and cannot be assumed by the Working Group in the absence of any evidence provided by the Government, either directly or during domestic legal proceedings. The Working Group notes that the prefect of Pointe-Noire, a State official, was summoned to provide evidence of the threat to State security, but failed to appear.

29. The Working Group therefore concludes that depriving the 14 CDRC members of their liberty is contrary to articles 9, 19 and 20 of the Universal Declaration of Human Rights and 9, 19 and 21 of the International Covenant on Civil and Political Rights. It should be recalled, once again, that these customary and treaty-based norms are binding on the Republic of the Congo.

30. Regarding the right to a fair trial, the source has indicated that Pointe-Noire police and gendarmerie officers carried out the arrests without a warrant and that the order of the Pointe-Noire *tribunal de grande instance* charging 28 persons, including the 14 currently in detention, with rebellion was not issued until 23 October 2013, two months after the arrests. The Working Group considers this to be a violation of article 9, paragraph 2, of the International Covenant on Civil and Political Rights, which provides that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

31. As to the source's allegations concerning the time that elapsed between the arrests and the judgement, the Working Group notes that a delay of over seven months is contrary to articles 9, paragraph 3, and 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights, which recognize the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge and tried within a reasonable time.

32. The source also claims to have been deprived of his right to a second hearing, pursuant to which an initial judgement may be appealed. This principle is recognized implicitly in article 14, paragraph 5, of the International Covenant on Civil and Political Rights, which provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". In the present case, the source states that a trial took place on 7 April 2014 before the Pointe-Noire criminal court, a special unit of the court of appeal, but that no first-instance judgement was ever issued. The Working Group therefore finds a violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

33. The Working Group considers that the non-observance of international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character.

34. Moreover, the source specifies that, on 18 July 2014, the 14 detainees were transferred from Pointe-Noire prison to an unknown location in Brazzaville, with no indication of the reasons for the transfer. The Working Group wishes to stress that, in accordance with principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly of the United Nations in its resolution 43/173 of 9 December 1988, "a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice [...] of the transfer and of the place where he is kept in custody".

35. This principle is also set out in rule 44 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. The Working Group holds that the transfer of the prisoners is in violation of the above-mentioned norms.

36. According to the information reported by the source, during their detention in Pointe-Noire prison, some of the 14 detainees were ill and did not receive treatment. However, as the source has provided no evidence of such a situation, the Working Group cannot conclude that there was a violation of the detainees' rights. The Working Group considers it necessary, nevertheless, to remind the Republic of the Congo of its obligations with respect to the treatment of prisoners, in accordance with international norms.

Disposition

37. In the light of the foregoing, the Working Group renders the following Opinion:

> The deprivation of liberty of Mbanza Judicaël, Kimangou Joseph, Miakamouna Nzingoula Sylvain, Bibila Gilbert, Mabiala Mpandzou Paul Marie, Tsiakaka Valentin, Baboyi Antoine, Silaho René, Matimouna Mouyecket Euloge, Kialounga Pierre Placide, Tandou Jean Claude Davy, Ngoma Sylvain Privat, Banangouna Dominique Mesmin and Londhet Moussa Landry is arbitrary and in violation of articles 9, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 14, 19 and 21 of the International Covenant on Civil and Political Rights. Consequently, it comes under categories I, II and III of the criteria applicable to the consideration of cases submitted to the Working Group.

38. The Working Group therefore requests the Government of the Republic of the Congo to release the above-mentioned persons without delay and take the necessary steps to remedy the material and moral injury that they have suffered, including by providing reasonable and appropriate compensation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

39. The Working Group recalls that the Human Rights Council has requested all States to cooperate with the Working Group, take account of its views and take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[7] The Working Group therefore requests the full cooperation of the Republic of the Congo in implementing this Opinion to provide effective redress for a violation of international law.

[*Adopted on 19 November 2014*]

[7] Human Rights Council resolution 24/7, paras. 3, 6 and 9.